

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SHAWN HORNBECK, et al.)	
each on behalf of himself and others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:18-cv-00523
)	
TRACTOR SUPPLY COMPANY, and)	
SMITTY’S SUPPLY, INC.,)	
)	
Defendants.)	

**SUGGESTIONS IN SUPPORT OF PLAINTIFFS’
APPLICATION FOR INCENTIVE AWARDS FOR CLASS REPRESENTATIVES AND
FOR CLASS COUNSEL’S EXPENSES AND ATTORNEYS’ FEES**

COME NOW PLAINTIFFS, and set forth the following for their Suggestions in Support of Application for Incentive Awards for Class Representatives and for Class Counsel’s Expenses and Attorneys’ Fees (“Application”):

I. Introduction

Class Representatives and Class Counsel devoted substantial time and effort in their prosecution of this case on behalf of the Class. The result of those efforts was a Class Settlement Agreement providing substantial economic relief to Class Members who purchased Super S Super Trac 303 Tractor Hydraulic Fluid in Missouri. Plaintiffs now seek incentive awards of \$5,000.00 for each of the four Class Representatives. This amount is appropriate and reasonable, and it is in line with amounts awarded to Class Representatives in other similar cases. Plaintiffs also seek an award of attorneys’ fees in the amount of \$511,500.00, an amount equal to approximately 30% of the Total Settlement Fund of \$1,700,000.00. Plaintiffs also seek reimbursement of \$150,000.00

of litigation expenses. The attorneys' fees and expenses sought are appropriate and reasonable, based on the Class Settlement Agreement achieved and the time and effort expended in this case. Defendants do not oppose this Application.

Rule 23(h) provides that, “[i]n a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by . . . the parties’ agreement. The Rule further provides that “[a] claim for an award must be made by motion under Rule 54(d)(2),” notice of which must be “directed to class members in a reasonable manner” and that the Court “must find the facts and state its legal conclusions under 52(a).” Fed. R. Civ. P. 23(h)(1) and (3). In turn, Rule 54(d)(2) requires a claim for fees to be made by motion, and specifies its timing and content, including, in relevant part, “the grounds entitling the movant to the award” and “the amount sought.” Fed. R. Civ. P. 54(d)(2)(B).

Notice of the attorneys’ fees, expenses, and incentive awards was provided in the Direct Notice mailed to Class Members, the published Summary Notice, and on the settlement website. Accordingly, Plaintiffs now move for approval of incentive awards of \$5,000.00 to each of the four Class Representatives and for an award to Class Counsel of attorneys’ fees of \$511,500.00 and expenses of \$150,000.00. For the reasons stated herein, Plaintiffs respectfully request their Application be granted.

II. **Incentive Awards**

Plaintiffs seek the Court’s approval of incentive awards of \$5,000 each. Incentive awards are typical in class actions. *Newberg on Class Actions* §11:38 (4th ed. 2008). Courts routinely grant incentive awards to class representatives in class action settlements to promote the public policy underlying class action litigation by encouraging individuals to step up on behalf of a class to vindicate those collective rights. *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017).

Factors in determining an appropriate incentive award include: “(1) actions the plaintiff took to protect the class’s interests, (2) the degree to which the class has benefitted from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation.” *Id.* (citation omitted).

These Class Representatives spent a substantial amount of time in meeting and talking with Class Counsel, assisting in development of the case, reviewing pleadings, responding to document requests and interrogatories, attending mediation, and preparing for depositions. Class Members throughout Missouri benefited based on the efforts of these Class Representatives. Further, the requested incentive awards are within the range approved by district courts in the Eighth Circuit. *See, e.g., Yarrington v. Solvay Pharms., Inc.*, 697 F.Supp. 2d 1057, 1069 (D. Minn. 2010) (\$5,000 to each of four class representatives); *Wineland v. Casey’s Gen. Stores, Inc.*, 267 F.R.D. 669, 677-78 (S.D. Iowa 2009) (\$10,000 to each of the named plaintiffs); *Zilhaver v. United Health Group, Inc.*, 646 F.Supp. 2d 1075, 1085 (D. Minn. 2009) (\$15,000 to two lead plaintiffs).

Accordingly, the Court should approve the \$5,000.00 incentive awards for each of the four Class Representatives.

III. Expenses

Class Counsel also seek reimbursement for \$150,000.00 in out-of-pocket expenses incurred in their prosecution of this case. (Ex. 1) Those expenses consist of filing and service costs, mediation expenses, expert fees, document management and hosting expenses paid to a third party, and the costs associated with depositions. Counsel do not seek to recover expenses relating to office or practice overhead, including the cost of paper copies and postage. The expenses requested are those that private, fee-paying clients in the marketplace are ordinarily charged and

ordinarily pay in addition to their attorneys' fees for services. As such, those expenses are recoverable even if some are not ordinarily taxable as costs.

As shown on the itemized list attached to the Declaration of Tom Bender, the major expenses in this case consisted of expert fees, deposition fees, and document management and database charges. Those expenses total more than \$200,000.00. (Exhibit 1, Declaration of Tom Bender). Class Counsel are only seeking to recover \$150,000.00 of these expenses in this litigation and will seek reimbursement of the remaining expenses in other class actions against these same Defendants and involving these same issues because the discovery conducted and experts utilized in this case are being used in those other cases.

Class Counsel's requested expense reimbursement of \$150,000.00 is reasonable and appropriate. Accordingly, the Court should approve the request.

IV. Attorneys' Fees

The Eighth Circuit has endorsed two approaches to analyzing a request for attorneys' fees: (1) the "percentage of the benefit" or "common fund" approach; and, (2) the lodestar approach. *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017), citing *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996); *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 222 (W.D. Mo. 2017)(citing *Galloway v. The Kan. City Lansmen, LLC*, 833 F.3d 969, 972 (8th Cir. 2016). It is within the discretion of the district court to choose which method to apply, as well as to determine what constitutes a reasonable attorneys' fee in a given case. *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017); *Pollard*, 320 F.R.D. at 222.

Whether viewed as a percentage of the benefit provided to Class Members or based on Class Counsel's lodestar, the requested fee of \$511,500.00 is fair and reasonable. The recovery

obtained for the Class is extremely favorable – providing real monetary relief equaling 50% or more of the purchase price of the tractor hydraulic fluid product at issue plus hundreds of thousands of dollars in compensation to Class Members for repairs, parts, and specific equipment damage. Plaintiffs suggest the Court follow the percentage of benefit approach, but will supplement their submissions in the event the Court determines the lodestar approach is more appropriate.

The fee sought is reasonable under the percentage of the benefit approach. The Eighth Circuit has noted that “courts have frequently awarded attorneys’ fees ranging up to 36% in class actions.” *Huyer*, 849 F.3d at 399. Courts have widely approved awards of attorneys’ fees in the range of one-third of the class recovery. See *In re US Bancorp Litigation*, 276 F.3d 1008, 1010 (8th Cir. 2002) (approving 36% fee); *West v. PSS World Med., Inc.*, 2014 WL 1648741 (E.D. Mo. Apr. 24, 2014) (approving 33% fee); *Ray v. Lundstrom*, 2012 WL 5458425 (D. Neb. Nov. 8, 2012) (1/3 fee approved); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 5547159 (N.D. Ia. Nov. 9, 2011) (approving fee of 36.04%); *In re Combustion, Inc.*, 986 F. Supp. 1116 (W.D. La. 1997) (approving 36% fee); *In re Airline Ticket Comm’n Antitrust Lit.*, 953 F.Supp. 280, 285-86 (D. Minn. 1997) (approving 33.3% fee); *In Re Wedtech Securities Litigation*, M21-46 (LBS) MDL 735 (S.D.N.Y. July 30, 1992) (approving 33.3% fee). “Regardless of case size, fees average approximately 32 percent of the settlement” in common fund cases. *In re Charter Comms., Inc. Sec. Litig.*, U.S. Dist. Lexis 14772, *45 (E.D. Mo. June 30, 2005).

Further, the facts and circumstances of this case support the percentage fee award sought. The case of *In re Texas Prison Litig.*, 191 F.R.D. 164 (W.D. Mo. 2000), applied factors set forth in *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975), to assess a fee request in a percentage of the fund case. The *Texas Prison* Court set forth the following factors to be considered:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of other employment by the attorney due to acceptance of the case;
- (5) The customary fee for similar work in the community;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The undesirability of the case;
- (11) The nature and length of the professional relationship with the client;
and
- (12) Awards in similar cases.

Id. at 176 (internal quotations omitted), citing *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (holding that the *Johnson* factors are relevant to the percentage that should be awarded as fees).

Application of these factors supports the conclusion that the requested 30% requested attorneys' fee percentage is reasonable and proper. (*See* Ex. 1, Declaration on Class Counsel Thomas V. Bender). This case required a significant amount of time, with Class Counsel expending more than 2,000 attorney hours, the lodestar of which would be well over \$1,000,000 in attorneys' fees. (Exhibit 1). The case presented novel and difficult legal questions and class claims which required a high level of skill to forward. All of the firms representing the Class are

relatively small in size such that the ability to undertake other additional work was affected. The customary fee for contingency cases is 33%, but often can be as high as 40% or 50% in complex matters. The fee in this case was contingent such that there were significant risks, with recovery by no means assured. The attorneys involved are experienced, have good reputations, and have demonstrated the ability to prosecute this and other cases.

As discussed above, the awards in similar cases support a higher fee percentage than the 30% sought here. The Total Settlement Fund is \$1,700,000.00, and this result could not have been achieved without a demonstration by Plaintiffs and Class Counsel that they were ready and willing to proceed to class certification and trial. Given this result achieved and work performed, as well as application of the above *Texas Prison* and *Johnson* factors, the percentage and overall amount of attorneys' fees requested here are well within the range that has been approved by the Eighth Circuit and Western District of Missouri in other class actions.

The extensive discovery conducted in this case also weighs in favor of the requested fee. Plaintiffs served on each Defendant First Interrogatories and First Requests for Production of Documents. Plaintiffs also served First Requests for Admissions, Second Interrogatories, and Second Requests for Production of Documents. Search terms were utilized for email discovery. All totaled, more than one million pages of documents were produced by Defendants, and eleven depositions were taken of Defendants' witnesses. Plaintiffs also retained and involved expert witnesses, and these witnesses provided preliminary expert reports. Plaintiffs filed their class certification motion and brief in June of 2019.

As noted, Class Counsel spent more than 2,000 attorney hours in the extensive efforts in this case. The lodestar for these attorney hours alone would be well in excess of \$1,000,000 in attorneys' fees. Class Counsel, however, only seek to recover \$511,500.00 for attorneys' fees in

this case and will seek to recover for the additional attorneys' fees in other class actions against these same Defendants and involving these same issues because the discovery, experts, and other efforts of Class Counsel in this case are being used in those other cases.

V. **Conclusion**

The requests for attorneys' fees, expenses, and incentive awards are reasonable. Plaintiffs respectfully seek the Court's Order and Judgment approving the Parties' Settlement Agreement, including ordering that Defendants separately pay incentive awards of \$5,000.00 to each of the four Class Representatives and Class Counsel's requested fees of \$511,500.00 and expenses of \$150,000.00.

Date: February 3, 2020

Respectfully Submitted,

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**ATTORNEYS FOR PLAINTIFFS
AND CLASS MEMBERS**

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SHAWN HORNBECK, et al.)	
each on behalf of himself and others)	
similarly situated,)	
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Plaintiffs,)	
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v.)	Case No. 4:18-cv-00523
)	
TRACTOR SUPPLY COMPANY, and)	
SMITTY'S SUPPLY, INC.,)	
)	
Defendants.)	

DECLARATION OF THOMAS V. BENDER
IN SUPPORT OF INCENTIVE AWARDS TO CLASS REPRESENTATIVES
AND APPLICATION OF CLASS COUNSEL FOR AWARD OF FEES AND
EXPENSES

I, Thomas V. Bender, declare as follows:

1. I am an attorney licensed to practice in the state of Missouri and in the United States District Court for the Western District of Missouri.

2. I am one of the lead counsel in the above-captioned litigation, and I make this Declaration in support of Plaintiffs' Application for Incentive Awards for Class Representatives and for Award of Attorneys' Fees and Expenses. I have actively participated in all aspects of this litigation, and I make this Declaration based on my personal knowledge.

3. Class Counsel request that the four Class Representatives Shawn Hornbeck, Monte Burgess, Dan Chevalier, and Russ Mapes each be awarded an incentive award of \$5,000.00. This request is supported by law and the circumstances of this case. These Class Representatives represented purchasers across the state of Missouri. They actively participated in the case, providing Class Counsel with input in case development and responsive documents and information. They produced documents, responded to interrogatories, participated in mediation and were each prepared for their depositions to take place when the Parties instead engaged in final settlement negotiations and discussions. These Class Representatives understand that the amount of the incentive award, if any, is in the discretion of the Court. Pursuant to the Settlement Agreement, Defendants have no opposition to an award by the Court of incentive awards of \$5,000.00 per Class Representative.

4. Class Counsel further request the reimbursement of litigation expenses and costs in the amount of \$150,000.00. Class Counsel incurred well in excess of \$150,000.00 in expenses and costs, and a summary of some of the expenses incurred is attached to this Declaration as Exhibit A. As reflected in this exhibit, the primary areas of expense were expert charges, document management and hosting costs, and deposition costs. While the actual expense incurred exceed this amount, the work performed also can be apportioned to other class actions against these same

Defendants and involving these same issues as the discovery conducted and experts utilized in this case are similar to those other cases. Therefore, Class Counsel only seek to recover \$150,000.00 of these expenses in this litigation.

5. Pursuant to the Settlement Agreement, Defendants have no opposition to an award of \$150,000.00 to Class Counsel for reimbursement of expenses.

6. Class Counsel further request the award of attorneys' fees in the amount of \$511,500.00, which is approximately 30% of the 1,700,000.00 Total Class Settlement Fund.

7. The retention agreement between each of the Class Representatives and Class Counsel calls for payment of a contingency attorneys' fee of 33 1/3%, with the reimbursement of litigation expenses also to be contingent upon a recovery in this case. The 30% attorneys' fees requested is thus less than called for in Class Counsel's contracts with Class Representatives.

8. In addition to the attorney's fees requested by Class Counsel being supported by the Class Representatives' actual contingent fee agreements, the amount is also consistent with customary market rates for cases of this type. It is my opinion, based upon my years of experience and familiarity with the market for legal representation of the type provided to the Class Members in this action, the market rate for litigation of this type and with this recovery is a one-third contingency fee agreement.

9. Because this litigation required a substantial advancement of professional time and expense, the measure of recoverable damages is uncertain and the risk of nonpayment or underpayment is significant, it would be financially impossible for the Plaintiffs or any Class Members to have agreed to pursue this matter on any basis other than a contingency fee arrangement with expenses advanced by counsel. Accordingly, Class Counsel undertook the litigation on a contingent fee basis and advanced costs bearing the full risk that a recovery may not be realized. No Member of the Class was asked to pay any fees or advance the expense required to investigate, prepare for filing, and prosecute this litigation.

10. From the inception of this litigation, Plaintiffs' counsel has aggressively prosecuted this case and vigorously represented the best interests of the Plaintiffs and putative Class. The case was prosecuted by attorneys and staff from three Kansas City area Law Firms: Tom Bender and Dirk Hubbard of Horn, Aylward & Band, LLC; Gene Graham, Bill Carr, and Bryan White from White, Graham, Buckley & Carr, LLC; and Clayton Jones of Clayton Jones Law. Pursuit of this case has included investigating the facts, performing legal research, reviewing and analyzing documents, assembling and drafting pleadings, conducting discovery, and communicating with counsel for Defendants. Discovery and investigations have included requesting and reviewing information from the Missouri Department of Agriculture; exchange of information between the parties through discovery;

meeting and conferences with Class Representatives; meeting and conferences with representatives of Defendants; retention and consultation with experts; ESI and email search terms and discovery, review of documents and emails produced, preparing for and taking eleven (11) depositions, and class certification briefing. More than 1,000,000 pages of documents have been reviewed, many of them highly technical, including test results related to the Super S Super Trac 303 Tractor Hydraulic Fluid product. Overall, more than 2,000 hours of combined attorney time was spent that was directly related to this litigation, as well as hundreds of hours of other time attributable to investigating the industry as a whole. The lodestar for just the attorney hours (without consideration of legal assistants) expended by Class Counsel would be well in excess of one million dollars (\$1,000,000.00). However, Class Counsel is only seeking to recover for a portion of these attorneys' fees in this litigation. While the outcome of companion litigation is uncertain, Class Counsel will seek recovery for the remaining fees in other class actions against these same Defendants and involving these same issues because the discovery conducted, experts utilized, and other efforts of Class Counsel in this case are being used in those other cases.

11. The proposed Settlement provides substantial benefit Class Members who have purchased Super S Super Trac 303 Tractor Hydraulic Fluid throughout the state of Missouri between May 25, 2013 and the present. As described in detail in

the Settlement Agreement, the Settlement provides significant payments to the Class in a way that addresses the fundamental issues underlying this case. The Total Class Settlement Fund of \$1,700,000.00 is sufficient to provide each Settlement Class Member with an estimated minimum payment in an amount which equates to be 50% of the average purchase price for the units of Super S Super Trac 303 Tractor Hydraulic Fluid purchased by each such Settlement Class Member during the class period and also to fund all Class Members' claims for repairs, parts, and/or specific equipment damage resulting from use of the product.

12. Plaintiffs' counsel have diligently investigated and prosecuted this matter, dedicating substantial time, effort, resources, and expertise to the investigation and prosecution of the claims at issue in the action, and have successfully negotiated the Settlement of this matter to benefit the Class.

13. I respectfully request the Court find and conclude that incentive awards of \$5,000.00 each are appropriate for each of the four Class Representatives, that \$150,000.00 in reimbursement of expenses should be awarded to Class Counsel, and that \$511,500.00 in attorneys' fees should be awarded to Class Counsel.

14. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date Executed: 2/3/20

/s/ Thomas V. Bender
Thomas V. Bender

Exhibit A
Hornbeck, et al. v. Tractor Supply Company, et al.
Case No. 18-cv-00523

General Expenses

<u>Date</u>	<u>Payee</u>	<u>Description</u>	<u>Amount Paid</u>
05/25/2018	Circuit Court	Filing Fee	\$110.50
05/29/2018	Sheriff	Service Fee(s)	\$179.45
05/29/2019	Sheriff	Service Fee	\$36.00
08/01/2018	MO Dept. of Ag.	FIOA Payment	\$383.03
11/01/2018	Phil Miller	Mediation Fee	\$750.00
06/26/2019	Jerry Palmer	Mediation Fee	\$3,491.15
Sub Total:			\$4,950.13

Expert Expenses

2018/2019	Tom Glenn	Expert Fees	\$30,000.00
2019	Dr. Werner Dahm	Expert Fees	\$52,000.00
Sub Total:			\$82,000.00

Complete Legal – Document Management

12/31/2018	Complete Legal	Hosting Fee	\$2,207.73
01/31/2019	Complete Legal	Hosting Fee	\$1,365.00
02/28/2019	Complete Legal	Hosting Fee	\$1,875.00
03/31/2019	Complete Legal	Hosting Fee	\$3,555.00
04/30/2019	Complete Legal	Hosting Fee	\$16,780.00
05/31/2019	Complete Legal	Hosting Fee	\$37,005.00
06/30/2019	Complete Legal	Hosting Fee	\$17,675.00
07/30/2019	Complete Legal	Hosting Fee	\$10,850.00
07/30/2019	Complete Legal	Hosting Fee	\$465.00
Sub Total:			\$91,777.33

Depositions

12/18/2018	Clement and Sumrall	Reporter/Videographer	\$3,108.25
12/18/2018	Clement and Sumrall	Travel/Hotel/Food	\$1,806.31
01/22/2019	Lorio and Trahan	Reporter/Videographer	\$2,605.81
01/22/2019	Lorio and Trahan	Travel/Hotel/Food	\$2,390.55
03/12/2019	Schenk	Reporter/Videographer	\$3,516.90
03/12/2019	Schenk	Travel/Hotel/Food	\$2,518.15

03/15/2019	Milliken and McGrath	Reporter/Videographer	\$3,255.31
03/15/2019	Milliken and McGrath	Travel/Hotel/Food	\$1,627.37
05/03/2019	Arnett	Reporter/Videographer	\$3,406.00
05/03/2019	Arnett	Travel/Hotel/Food	\$1,118.50
05/07/2019	Smith, Tate, Saragusa	Reporter/Videographer	\$5,793.40
05/07/2019	Smith, Tate, Saragusa	Travel/Hotel/Food	\$3,248.56
Sub Total:			\$34,411.11
TOTAL:			\$213,138.97